

Nos. 78-575, 78-597 and 78-604

Supreme Court, U. S.  
FILED

DEC - 8 1978

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

MICHAEL ROBAX, JR., CLERK

INTERSTATE COMMERCE COMMISSION, et al.,  
v. *Petitioners,*

SEABOARD ALLIED MILLING CORP., et al.,  
*Respondents.*

On Petitions for Writ of Certiorari to the United States  
Court of Appeals for the Eighth Circuit

REPLY OF SEABOARD ALLIED MILLING CORP.,  
ARCHER DANIELS MIDLAND COMPANY,  
ADM MILLING CO., CONAGRA, INC.,  
DIXIE-PORTLAND FLOUR MILLS, INC.,  
SOUTHEASTERN POULTRY AND EGG ASSOCIATION  
AND STATES OF NORTH CAROLINA AND INDIANA  
TO MEMORANDUM FOR THE UNITED STATES

JOHN H. CALDWELL  
PETER A. GREENE  
900 17th Street, N.W.  
Washington, D.C. 20006

*Attorneys for Seaboard Allied  
Milling Corp., Archer Daniels  
Midland Company, ADM  
Milling Co., ConAgra, Inc.,  
Dixie-Portland Flour Mills,  
Inc., and Southeastern Poultry  
and Egg Association*

RUFUS L. EDMISTEN  
*Attorney General*

JACOB SAFRON  
*Special Deputy Attorney  
General*

RICHARD L. GRIFFIN  
*Associate Attorney General*  
P. O. Box 629  
Raleigh, NC 27602

*Attorneys for State of  
North Carolina*

THEODORE L. SENDAK  
*Attorney General*

DONALD P. BOGARD  
*Chief Counsel*

WILLIAM G. MUNDY  
*Deputy Attorney General*  
219 State House  
Indianapolis, IN 46204

*Attorneys for State of Indiana*

DECEMBER 1978

## TABLE OF CONTENTS

	<i>Page</i>
REPLY ARGUMENT .....	2
A. The Circuits Are Not In Conflict .....	2
B. Although Conceding Reviewability Of The Commission's Decision, The Solicitor General Is Wrong In Contending Such Review Must Await The Outcome Of A Section 13(1) Pro- ceeding .....	4

## TABLE OF AUTHORITIES

### *Cases:*

<i>A. L. Mechling Barge Lines v. United States</i> , 376 U.S. 375 .....	5
<i>Atchison, Topeka &amp; Santa Fe Ry. v. Wichita Board of Trade</i> , 412 U.S. 800 .....	6
<i>Davis v. Portland Seed Co.</i> , 264 U.S. 403 .....	4
<i>Intermountain Rate Cases</i> , 234 U.S. 476 .....	4
<i>Leedom v. Kyne</i> , 358 U.S. 184 .....	3, 6
<i>National Small Shipments Traffic Conference, Inc., et al. v. Interstate Commerce Commission</i> , No. 78-1099, slip op. (D.C. Cir.) .....	2
<i>Oesterich v. Selective Service System</i> , 393 U.S. 233 .....	6
<i>Seatrain Lines, Inc. v. United States</i> , 168 F.Supp. 819 .....	5
<i>The Council of Forest Industries v. Interstate Commerce Commission</i> , No. 76-1926, slip op. (D.C. Cir.) .....	3, 5
<i>Trans Alaska Pipeline Rate Cases</i> , — U.S. —, 98 S.Ct. 2053 .....	3, 6

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

---

Nos. 78-575, 78-597 and 78-604

---

INTERSTATE COMMERCE COMMISSION, et al.,  
*Petitioners,*

v.

SEABOARD ALLIED MILLING CORP., et al.,  
*Respondents.*

---

On Petitions for Writ of Certiorari to the United States  
Court of Appeals for the Eighth Circuit

---

REPLY OF SEABOARD ALLIED MILLING CORP.,  
ARCHER DANIELS MIDLAND COMPANY,  
ADM MILLING CO., CONAGRA, INC.,  
DIXIE-PORTLAND FLOUR MILLS, INC.,  
SOUTHEASTERN POULTRY AND EGG ASSOCIATION  
AND STATES OF NORTH CAROLINA AND INDIANA  
TO MEMORANDUM FOR THE UNITED STATES

---

Although the Solicitor General's Memorandum<sup>1</sup> supports granting of certiorari, it reflects a fundamental misconception of this case. The Memorandum suggests a conflict in circuits but without plausible explanation. It

---

<sup>1</sup> Not joined in by the Antitrust Division of the Department of Justice.

totally ignores a recent decision which dispels any question of conflict. The Memorandum agrees with these respondents that section 4(1) is an absolute prohibition (n.5, page 4) and that the Commission's decision is reviewable (page 12) but it concludes, inconsistently, that review should "await an appropriate occasion" after a section 13(1) proceeding.<sup>2</sup> The Solicitor General has a seriously confused version of the controlling legal principles.

## REPLY ARGUMENT

### A. The Circuits Are Not In Conflict.

That there is no conflict between circuits is demonstrated by *National Small Shipments Traffic Conference, Inc., et al. v. Interstate Commerce Commission*, No. 78-1099, slip op. at 9 n.34 (D.C. Cir. October 26, 1978) in which the D.C. Circuit cited with approval the holding of the Eighth Circuit that a decision not to investigate charges of patent illegality is reviewable.<sup>3</sup> Had a conflict existed, the D.C. Circuit would have so indicated. Significantly, the Memorandum of the Solicitor General does not discuss or explain how a conflict could exist in view of *National Small Shipments*, *supra*.

This conspicuous absence of reference to the recent pronouncement of the D.C. Circuit on the issue of reviewability underscores the Solicitor General's misreading of

<sup>2</sup> As stressed, *infra*, this approach would negate the fundamental purpose of section 4(1).

<sup>3</sup> In determining that a portion of an ICC decision permitting interim use of a motor carrier platform study, previously subject of court order, was ripe for review, the D.C. Circuit indicated it was unsympathetic with "arguments that a case is unripe which would insulate from review plain contradictions of a court order." Similarly here the Eighth Circuit would not excuse clear Commission defiance of statutory requirements. Considerations favoring immediate review of action contrary to a court order are equally compelling as to action contrary to a statute.

*Asphalt* and the decision below. *Asphalt* did not involve, directly or indirectly, any issue of patent illegality under section 4(1). Nor did it involve a prematurely terminated or aborted pre-effectiveness investigation. Put simply, *Asphalt* merely restated<sup>4</sup> the *Arrow* doctrine as applicable to a case where the Commission exercised Congressionally conferred discretion not to suspend or investigate under section 15(8). This case does not fit within *Asphalt*, *Arrow*, or similar cases. At issue is agency defiance of a plainly stated statutory mandate. What the Solicitor General overlooks is that the failure to resolve fourth section allegations is reviewable unlike a discretionary section 15(8) failure or refusal to suspend or investigate a tariff not alleged to be patently illegal under section 4(1). The Eighth Circuit found and properly corrected statutory dereliction of duty by the Commission. The D.C. Circuit did not confront such a situation and if it had, it would have reached the same result as the court below consistent with the role of the judiciary to correct agency abuses of statutory authority. See *Leedom v. Kyne*, 358 U.S. 184.<sup>5</sup>

Accordingly, the Solicitor General is incorrect in suggesting a conflict exists in the circuits. Indeed, the decision below is required by and consistent with long standing section 4(1) case precedent.<sup>6</sup>

<sup>4</sup> The holding is accompanied by little explication of reasons. A more detailed discussion of the reviewability of general revenue orders is found in *The Council of Forest Industries v. Interstate Commerce Commission*, No. 76-1926, slip op. at 9-13 (D.C. Cir. February 3, 1978). The instant case presents a different issue, the reviewability of agency action contrary to section 4(1) requirements.

<sup>5</sup> See also *Trans Alaska Pipeline Rate Cases*, — U.S. —, 98 S.Ct. 2053, 2058-2059, n. 17 and cases cited at n. 9, page 6, Brief for Seaboard Allied Milling, et al.

<sup>6</sup> See cases cited, page 10, Brief for Seaboard Allied Milling, et al.



**B. Although Conceding Reviewability of the Commission's Decision, the Solicitor General is Wrong In Contending Such Review Must Await The Outcome Of A Section 13(1) Proceeding.**

The Solicitor General agrees that section 4(1) absolutely prohibits rate tariffs violative of section 4(1).<sup>7</sup> He also agrees that the Commission's decision authorizing the disputed tariffs to become effective is reviewable. However, he commits fatal error in arguing illogically and inconsistently that court review should be deferred where a statutory violation occurs. The courts must intervene promptly since otherwise tariff rates void and illegal *ab initio* would be allowed to take effect.<sup>8</sup>

The Solicitor General is also advancing a general proposition<sup>9</sup> which may have significance in some other proceeding this Court may face in the future but which is essentially immaterial to this case. At issue here is Commission failure to abide by section 4(1), not mere refusal to "open" a section 15 investigation. The required investigation was a threshold one to determine if the tariffs violated section 4(1) and, if so, then the Commission could not allow them to become effective absent full compliance with section 4(1) procedure. Unless such a pre-effective section 4(1) determination is made, illegal

<sup>7</sup> The Solicitor General refers to the section 4(1) prohibition as absolute while describing the obligation of the carriers not to "collect" illegal charges violative of the section. The prohibition, however, goes further and precludes even the *establishment* of tariffs containing fourth section departures. *Intermountain Rate Cases*, 234 U.S. 476, 485-486; see also *Davis v. Portland Seed Co.*, 264 U.S. 403, 424.

<sup>8</sup> Under the Solicitor General's untenable position the railroads would be permitted to charge and collect illegal charges in direct contravention of a statutory prohibition the Solicitor General agrees is absolute.

<sup>9</sup> That proposition is that a refusal to investigate under section 15(8) becomes fully reviewable following final ICC disposition of a section 13(1) case.

rates could become effective contrary to the statutory mandate.<sup>10</sup>

Courts, including this Court, have uniformly held that failure to abide by fourth section requirements is final reviewable action, and there is no requirement for a party first to resort to complaint procedures under section 13(1).<sup>11</sup> *Seatrains Lines, Inc. v. United States*, 168 F.Supp. 819, 824 (S.D.N.Y.); *A. L. Mechling Barge Lines, Inc. v. United States*, 376 U.S. 375, 379, 385. A requirement that a section 13(1) investigation be commenced before review can take place effectively precludes review of the earlier failure of the Commission to abide by the pre-effectiveness requirements since by that time the rates are already in effect.<sup>12</sup> This approach would fly in the face of unequivocal Congressional intent expressed in section 4(1).

If the Commission can ignore section 4(1) it can do likewise as to numerous other obligatory sections of the Act entrusted to its stewardship. Immediate judicial intervention is essential to correct "blatantly lawless ac-

<sup>10</sup> As noted, the Solicitor General agrees this mandate is absolute.

<sup>11</sup> Section 13(1) allows any person to submit a complaint to the Commission regarding action "by any common carrier" in contravention of the Interstate Commerce Act. On its face that section affords parties no relief for improper action by the Commission in derogation of its duties under section 4(1). The type of investigation contemplated by section 13(1) reaches only the question of whether established rates are unlawful, not whether they have been legally established. Section 15(1) proceedings require the complainant to bear the burden of proof and that section provides for future prescription of lawful rates, not automatic refunds of unlawful or illegal charges. See *Council of Forest Industries, supra*, slip op. at 6-8.

<sup>12</sup> The result of Commission decision in this case was an immediate and substantial "bite". Patently illegal rate tariffs were allowed to take effect, to be charged and collected from respondents and other adversely affected shippers, in direct contravention of section 4(1). This was vastly different than a mere failure to investigate under section 15(8).

tion.”<sup>13</sup> No interference with the primary jurisdiction of the Commission is involved. The court below has required the Commission to adhere to the statute without deciding or prejudging policy or directing any particular substantive outcome. To require pre-effective observance of section 4(1) is in no way an interference with the primary jurisdiction of the Commission.<sup>14</sup>

Judicial review of the Commission's decision was justified and necessary to insure that administrative agency stayed within the bounds of its authority.

<sup>13</sup> See *Atchison, T. & S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800, 822 n. 16. Where such conduct is involved courts have not hesitated to intervene since otherwise the statutory scheme could be destroyed by runaway agencies. Moreover, cases upholding immediate review of agency action contrary to or in excess of delegated powers do not require affected parties to pursue prior relief before the agency violating its statute. *Leedom v. Kyne*, 358 U.S. 184; *Oesterich v. Selective Service System*, 393 U.S. 233; *Trans Alaska Pipeline Rate Cases*, — U.S. —, *supra*, 98 S. Ct. at 2058-2059 n. 17. The latest statement on section 15(8) reviewability by this Court in *Trans Alaska* supports prompt reviewability of suspension orders to insure the Commission has not overstepped the bounds of its statutory authority.

<sup>14</sup> The court remanded to the Commission with instructions that the Commission determine the validity of allegations of patent illegality. The court did not intrude in the Commission's discretion.

Respectfully submitted,

JOHN H. CALDWELL  
PETER A. GREENE  
900 17th Street, N.W.  
Washington, D.C. 20006

*Attorneys for Seaboard Allied  
Milling Corp., Archer Daniels  
Midland Company, ADM  
Milling Co., ConAgra, Inc.,  
Dixie-Portland Flour Mills,  
Inc., and Southeastern Poultry  
and Egg Association*

RUFUS L. EDMISTEN  
*Attorney General*

JACOB SAFRON  
*Special Deputy Attorney  
General*

RICHARD L. GRIFFIN  
*Associate Attorney General*  
P. O. Box 629  
Raleigh, NC 27602

*Attorneys for State of  
North Carolina*

THEODORE L. SENDAK  
*Attorney General*

DONALD P. BOGARD  
*Chief Counsel*

WILLIAM G. MUNDY  
*Deputy Attorney General*  
219 State House  
Indianapolis, IN 46204

*Attorneys for State of Indiana*

DECEMBER 1978